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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK; AND DOES 1 THROUGH
100, INCLUSIVE.

Defendants.

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION *IN LIMINE* NO. 6
TO EXCLUDE EVIDENCE OR ARGUMENT
RELATING TO ANY PROTECTED CLASS OF
WHICH KARAGIOSIAN IS NOT A MEMBER,
INCLUDING AFRICAN-AMERICANS,
HISPANICS, AND FEMALES

Final Status Conference:

DATE: June 8, 2011

TIME: 9:00 a.m.

DEPT: 37

Trial Date: June 8, 2011

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. DEFENDANT'S ANSWER PLACED IN ISSUE

3 ALL SUCH ACTS OF HARASSMENT

4 In its Motion in *Limine* No. 6, Defendant seeks to exclude evidence or argument relating to
5 the harassment of individuals in any protected class of which Plaintiff Steve Karagiosian ("Plaintiff"
6 or "Karagiosian") is not a member. Defendant's Motion in *Limine* No. 6 should be denied because
7 any and all evidence of harassment is relevant to Plaintiff's Fifth Cause of Action, based on
8 Defendants' failure to prevent harassment as well as his cause of action for harassment.

9 Defendant City of Burbank raised the "avoidable consequences" doctrine as its Second
10 Affirmative Defense, alleging:

11 "The employer took reasonable steps to prevent and correct workplace harassment, but
12 Plaintiff(s) unreasonably failed to use the preventative and corrective measures provided by
13 the employer and reasonable use of the employer's procedures would have prevented at least
14 some, if not all, of the harm Plaintiff(s) allege she or he purportedly suffered.
(Answer to First Amended Complaint, p.2, ll.11-15.)"

15 Defendant's Answer places at issue previous acts of harassment, whether directed toward
16 Karagiosian or others, and Defendant's responses thereto. In *State Dept. of Health Services v.*
Superior Court (2003) 31 Cal. 4th 1026, the court explained:

17 "[T]o take advantage of the avoidable consequences defense, the employer ordinarily should
18 be prepared to show that it has adopted appropriate antiharassment policies . . . In a
19 particular case, **the trier of fact may appropriately consider** whether the employer
20 prohibited retaliation for reporting violations, whether the employer's reporting and
21 enforcement procedures protect employee confidentiality to the extent practical, and **whether**
22 **the employer consistently and firmly enforced the policy.** Evidence potentially relevant to
23 the avoidable consequences defense includes **anything** tending to show that the employer
24 took effective steps "to encourage victims to come forward with complaints of unwelcome
sexual conduct and to respond effectively to their complaints." (Grossman, *The First Bite Is*
Free: Employer Liability for Sexual Harassment (2000) 61 U.Pitt. L.Rev. 671, 696.) "[I]f an
employer has failed to investigate harassment complaints, [or] act on findings of
harassment, or, worse still, [has] retaliated against complainants, future victims will
have a strong argument that the policy and grievance procedure did not provide a
'reasonable avenue' for their complaints." (Id. at p. 699.)
(*State Dept. of Health Services, supra*, at pp.1045-1046.)

25 The court continued:

26 "A conscientious employer will quickly stop the misconduct of which it becomes aware.
27 Prompt employer intervention not only minimizes injury to the victim, but also sends a clear
28 message throughout the workplace that harassing conduct is not tolerated. Employers who
take seriously their **legal obligation** to prevent harassment are an employee's best protection
against workplace harassment." (Id. at p.1049, emphasis added.)

1 Thus, under *State Dept. of Health Services*, “the trier of fact may appropriately consider”
2 previous acts of harassment directed both at Plaintiff **and at others**, and Defendant’s responses
3 thereto.

4 If “[e]vidence potentially relevant to the avoidable consequences defense includes **anything**
5 tending to show that the employer took effective steps ‘to encourage victims to come forward with
6 complaints of unwelcome sexual conduct and to respond effectively to their complaints,” then it
7 follows that relevant evidence also includes **anything** that shows that the employer failed “to
8 encourage victims to come forward with complaints of unwelcome sexual conduct and to respond
9 effectively to their complaints.” This includes evidence of previous acts of harassment toward
10 Plaintiff **and others** and Defendants responses thereto.

11 Furthermore, one of the policies behind FEHA is to deter future harassment by the same
12 offender or others by prompt effective action. In *Doe v. Starbucks, Inc.* (C.D. Cal. Dec. 18, 2009)
13 2009 U.S. Dist. LEXIS 118878, the court explained:

14 “Section 12940(k) requires that an employer take all reasonable steps necessary to prevent
15 harassment. In an analogous Title VII situation, the Ninth Circuit has held that “[o]nce an
16 employer knows or should know of harassment, a remedial obligation kicks in. That
17 obligation will not be discharged until action - prompt, effective action - has been taken.
18 Effectiveness will be measured by the twin purposes of ending the current harassment and
19 deterring future harassment - **by the same offender or others.**” *Fuller v. City of Oakland*, 47
20 F.3d 1522, 1528 (9th Cir. 1995) (citations omitted). “The affirmative and mandatory duty to
ensure a discrimination-free work environment requires the employer to conduct a prompt
investigation of a discrimination claim.” *Am. Airlines, Inc. v. Superior Court*, 114 Cal. App.
4th 881, 890, 8 Cal. Rptr. 3d 146 (2003), reh’g denied and review denied 2004 Cal. App.
LEXIS 147 (2004).”
(*Doe v. Starbucks, Inc.*, *supra*, at pp. 34-35, emphasis added.)

21 This policy to deter future harassment, by the same offender or others by prompt effective
22 action, places in issue whether past instances of harassment, whether directed toward plaintiff or
23 others, were met with prompt effective action. “Inaction constitutes a ratification of past harassment,
24 even if such harassment independently ceases. (citations)” *McGinest v. GTE Service Corp.*, *supra*, at
25 360 F.3d 1120. Such evidence of the employer’s efforts to broadly address harassment when it
26 knows or has reason to know of its existence is highly probative, particularly when the harassment
27 stems from co-workers as opposed to supervisors and managers. *Nichols v. Azteca Rest. Enters.*, (9th
28 Cir. 2001) 256 F.3d 864, 875-876 (“When the employer undertakes no remedy, or where the remedy
does not end the current harassment and deter future harassment, liability attaches for both the past

1 harassment and any future harassment.")

2 Thus, instances of past harassment directed toward individuals other than Plaintiff, and
3 Defendant's responses thereto, are admissible.

4 **II. DEFENDANT SEEKS TO 'SANITIZE' THE ENVIRONMENT IN ORDER TO**
5 **PREVENT PROPER ANALYSIS OF THE TOTALITY OF CIRCUMSTANCES**
6 **AFFECTING KARAGIOSIAN'S WORK.**

7 In order to assess Karagiosian's work environment, the jury must be able to consider the
8 *totality of circumstances* of Karagiosian's environment. *Haberman v. Congage Learning, Inc.*
9 (2009) 180 Cal.App.4th 383, 379. Harassment of women and minorities in protected groups,
10 whether or not they are Armenian, has a substantial impact on the workplace and is part of the
11 totality of circumstances that must be considered by the jury. Then, the jury must determine whether
12 a reasonable person in Karagiosian's position would find *all* of such conduct (though included and
13 given the greatest weight is conduct specifically directed at Karagiosian) sufficiently severe and
14 pervasive to make it more difficult to perform his job. *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202
15 F.3d 560, 579; Instead, Defendant seeks to present a *sanitized and incomplete picture* of the
16 workplace, which makes it impossible to assess the totality of circumstances which either support or
17 belie Plaintiff's allegations.

18 At the heart of this trial will be a determination of whether or not the harassment of
19 Karagiosian was severe and pervasive. Absent an adverse employment action, a claim of harassment
20 must be supported by evidence of a "hostile work environment." In order to prove a claim of
21 harassment, the plaintiff must show "a concerted pattern of harassment of a repeated, routine or
22 generalized nature" which created an "unreasonably abusive or offensive work-related environment
23 or adversely affected the reasonable employee's ability to do his . . . job." *Davis v. Monsanto*
24 *Chemical Co.* (1988 6th Cir.) 858 F.2d 345, 350; see also *Walker v. Meuller Industries, Inc.*

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1 **III. HARASSMENT TOWARD OTHERS WITNESSED BY PLAINTIFF**
2 **IS RELEVANT TO PLAINTIFF'S HARASSMENT CLAIM**
3 **AND HIS CLAIM THAT DEFENDANT FAILED TO TAKE**
4 **REASONABLE STEPS TO PREVENT HARASSMENT**

5 This concept has been fully embraced by California courts. It is expressly set forth in the
6 current CACI Series 2500 (Fair Employment and Housing Act) jury instructions juror consideration
7 of harassment directed at others. Instruction No. 1-2500 CACI 2521B states in relevant part:

8 “2. That [name of plaintiff], although not personally subjected to unwanted harassing conduct,
9 personally witnessed harassing conduct that took place in [his/her] immediate work environment.
10 ...
11 6. [Select applicable basis of defendant's liability:]
12 [That a supervisor engaged in the conduct;] or
13 [That [name of defendant] [or [his/her/its] supervisors or agents] knew or should have known
14 of the conduct and failed to take immediate and appropriate corrective action.;]
15 8. That the conduct was a substantial factor in causing [name of plaintiff]'s harm.”

16 In the Judicial Council's discussion of this specific instruction, it relies upon various
17 provisions of the Fair Employment and Housing Act (Gov. Code §§12926 et seq.), as well as the
18 following case law: *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519-520 (expressly
19 discusses harassing conduct witnessed by the plaintiff but directed at others), *Lyle v. Warner*
20 *Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 (discusses harassing conduct
21 witnessed by the plaintiff but directed at others); *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 456,
22 464-465 (“severe or pervasive” standard applies to harassment of any protected class, as well as
23 sexual harassment).

24 Moreover, the *Lyle* case discusses the weight that should be given to harassment witnessed by
25 the plaintiff but directed at others. *Lyle, supra*, at 284-285. While harassment directed at others is
26 afforded less weight than harassment directed at the plaintiff, all such conduct is admissible and
27 allows the jury to assess the totality of circumstances of the plaintiff's work environment.

28 In this case, Karagiosian witnessed significant instances of harassment which personally
targeted him, and a multitude of instances of harassment directed at others, all of which contributed
to reducing Karagiosian's work environment to one that is sufficiently “hostile” to support his cause
of action for harassment.

1 **IV. FEDERAL COURTS ACKNOWLEDGE THAT HARASSMENT OF**
2 **OTHER PROTECTED GROUPS CAN CONTRIBUTE TO A**
3 **DETERMINATION OF A HOSTILE WORK ENVIRONMENT.**

4 Federal courts recognize that a working environment heavily charged with ethnic or racial
5 discrimination violates both Title VII and FEHA. *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 US
6 57, 66. Because an inquiry to determine whether a hostile work environment exists, a hostile
7 environment may exist even if some of the hostility is directed at other workers.

8 In *Cruz v. Coach Stores, Inc.* (2d Cir. 2000) 202 F.3d 560, 579, the court recognized that
9 slurs directed at both Hispanics and African-Americans could create a hostile work environment. In
10 that case.

11 “Determining whether workplace harassment was severe or pervasive enough to be
12 actionable depends on the *totality of the circumstances*. Because the crucial inquiry focuses
13 on the nature of the workplace environment as a whole, *a plaintiff who herself experiences*
discriminatory harassment need not be the target of other instances of hostility in order for
those incidents to support her claim.” *Cruz*, supra at 570.

14 The court considered the Human Resources Manager’s repeated references to “niggers,” and
15 comments such as “colored people’s time,” as well as comments concerning the plaintiff’s protected
16 class as relevant and supportive of her claim of a hostile work environment. *Cruz*, supra at 571.

17 While there are few, if any, cases which address whether a cause of action for sexual
18 harassment based on hostile work environment may lie when *none* of the harassment is directed
19 towards the plaintiff, harassment of multiple protected classes, including the class to which the
20 plaintiff belongs is relevant to the totality of circumstances which create the working environment.
21 In *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1117, an African-American
22 employee offered considerable evidence of years of harassment directed at him personally. In
23 addition, the court also deemed the harassment of his white friend because of their friendship a
24 contributing factor to the creation of the plaintiff’s hostile work environment.

25 **V. CONCLUSION**

26 In sum, the evidence and argument which Defendant seeks to exclude is relevant and material
27 to its Second Affirmative Defense. Moreover, exclusion of Karagiosian’s observations of racial,
28 ethnic and sexual harassment directed at his friends and co-workers is part of, and material to, the

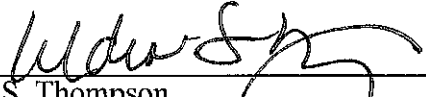
1 “totality of circumstances” of Karagiosian’s working environment. The efficiency, or lack thereof,
2 of management action in addressing acts of discrimination, retaliation and harassment against *anyone*
3 in a protective group is relevant to Defendant’s “avoidable consequences” defense.

4 For all of the foregoing reasons, Plaintiff respectfully requests that the court deny
5 Defendant’s Motion in Limine No. 6 in its entirety.

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7 DATED: May 25, 2011

Respectfully submitted,

8 LAW OFFICES OF RHEUBAN & GRESEN

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10 By: 
11 India S. Thompson
12 Attorneys for Plaintiff, Steve Karagiosian
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